BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint Against Margie MacDonald	))	**SUMMARY OF FACTS AND STATEMENT OF FINDINGS**

Roy Brown filed a complaint against Margie MacDonald, alleging she violated Montana campaign finance and practices laws. The complaint alleges that Margie MacDonald violated § 13-37-131, MCA (Misrepresentation of voting record – political civil libel), § 13-35-301, MCA (Montana's Code of Fair Campaign Practices), and § 13-35-225, MCA (Election materials not to be anonymous – statement of accuracy).

SUMMARY OF FACTS

1. Roy Brown was the Republican candidate for State Senate District

2. Prior to running for election to the State Senate, Brown had served several terms in the Montana House of Representatives.

3. During the campaign MacDonald mailed a campaign flyer containing certain representations regarding Brown's voting record while he was in the House during the 2005 session of the Montana Legislature. Brown complains about the following statements in the flyer:

> Roy *opposed* purchasing pools and tax credits for small businesses to help cover their employees with health insurance. (Emphasis in original)
>
> (Roy Brown, nay, HB 667, 2nd Reading D/Concur, 4/18/2005; on final vote Rep. Brown changed his vote to yes)

The flyer does not contain a "statement of accuracy" as required by § 13-35-225(3)(a), MCA.

4. Brown alleges the statements quoted above misrepresent his vote on House Bill (HB) 667. He contends his second reading "no" vote was only on the question whether to concur in Senate amendments to HB 667. Brown also alleges

the flyer inaccurately states that he "changed" his vote when he voted "aye" on third reading. He claims that the only vote showing whether he favored or opposed the bill is the final (third reading) vote. Brown's complaint states: "HB 667 was a very important bill to me and I strongly supported it." He contends that MacDonald's claim that he opposed HB 667 is "blatantly false."

5. In his complaint Brown cites House Rule 40-220, which states in part:

> **Senate amendments to House legislation.** (1) When the Senate has properly returned House legislation with Senate amendments, the House shall announce the amendments on Order of Business No. 4, and the Speaker shall place them on second reading for debate. The Speaker may rerefer House legislation with Senate amendments to a committee for a hearing if the Senate amendments constitute a significant change in the House legislation. The second reading vote is limited to consideration of the Senate amendments.
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> (2) If the House accepts Senate amendments, the House shall place the final form of the legislation on third reading to determine if the legislation, as amended, is passed or if the required vote is obtained.
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> (3) If the House rejects the Senate amendments, the House may request the Senate to recede from the amendments or may direct appointment of a conference committee and request the Senate to appoint a like committee.
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> . . .

6. Brown included with his complaint a copy of an email from Greg Petesch, the Code Commissioner and Chief Legal Counsel for the Legislative Services Division. The email, after quoting House Rule 40-220, states: "This rule makes it perfectly clear that the second reading vote on House legislation returned by the Senate with amendments is limited to voting on accepting or rejecting the Senate amendments. If the Senate amendments are accepted, then the third reading vote is on the bill, as amended."

7. HB 667 was introduced on February 11, 2005. The primary sponsor was David Wanzenried, who at the time was a member of the House and the House Democratic Leader. The act created a small business health insurance pool, provided for employer premium incentive and assistance payments, and afforded tax credits to eligible small business employers who provided certain group health plan coverage for their employees.

8. In response to the complaint MacDonald submitted a memo written by Wanzenried. In the memo Wanzenried pointed out that in the 2005 session of the Montana Legislature, there were 50 Republicans and 50 Democrats in the House of Representatives. According to Wanzenried, to facilitate the conduct of business in the House, given its evenly divided composition, the two parties negotiated an agreement whereby each party leader in the House was given 12 "silver bullets". Wanzenried explained that a "silver bullet" was a special privilege that each leader could use to take an individual bill from committee if it was stalled on a tie vote, and place the bill on second reading.

9. Following a hearing on HB 667 before the House Taxation Committee, the committee voted 10-10 on the question of passage of the bill out of committee. According to Wanzenried's memo, he recalls that due to the tie vote he used one of the "silver bullets" to take HB 667 from the committee and place it on second reading.

10. After HB 667 was taken from the House Taxation Committee, Brown voted no on second reading on March 14, 2005. The bill passed second reading by a vote of 69-31. HB 667 was then re-referred to the House Appropriations Committee, and it passed out of committee, with amendments, on March 24, 2005, by a vote of 18-2. Brown voted "aye" on the bill on second and third reading, and HB 667 was transmitted to the Senate on March 29, 2005.

11. HB 667 was returned to the House with Senate amendments on April 16, 2005. On April 18, 2005 Brown voted no on the question whether the House should concur in the Senate amendments. The vote was 61-38 in favor of concurring in the Senate amendments, and HB 667 was scheduled for third reading on the same date. Brown voted aye on third reading, and the bill was passed as amended by the Senate. On May 6, 2005 HB 667 was signed by the Governor, with a July 1, 2005 effective date.

12. Brown explained his no vote on second reading on March 14, 2005 by noting that he was waiting for a similar bill that was being drafted by Republican House member Alan Olson. Brown maintains he supported the concept of purchasing pools and tax credits for health insurance, but he believed that Olson's bill, if introduced, would provide better coverage. Brown states that when it became apparent to him that Olson's bill was not going to be introduced, he decided to give his full support to HB 667. Brown explained his no vote on the question of concurring in the Senate amendments on April 18, 2005 by noting that he did not believe the bill was improved by the amendments. He states that he nevertheless continued to support the concepts embodied in the bill, thus he subsequently decided to vote aye on the final version of the bill with the Senate amendments, despite some reservations regarding the amendments.

13. MacDonald included with her response to the complaint a document that is represented to be an excerpt of Rep. Alan Olson's statement during the floor debate on second reading on HB 667 on March 14, 2005. In the statement Rep. Olson states that he had planned to present a bill similar to HB 667, but following discussions with Montana State Auditor John Morrison, Olson decided that he could support HB 667. Olson urged others to support the bill as well.

14. MacDonald contends she did not misrepresent Brown's voting record because she accurately represented Brown's second and third reading votes on HB 667. She created the flyer using information provided by Gretchen Kruesi, the Montana Democratic Legislative Campaign Field Director. MacDonald concedes that House Rule 40-220 appears to limit Brown's April 18, 2005 no vote to the question of whether to concur in the Senate amendments. MacDonald contends that when the flyer was created she was not familiar with the provisions of House Rule 40-220, and she is not very familiar with the House rules at all. She states that had she been aware of House Rule 40-220 she would have substituted a reference to Brown's no vote on second reading on March 14, 2005. MacDonald

refers to her error in citing the April 18, 2005 vote instead of the March 14, 2005 vote as an error "of citation, not content."

15. MacDonald asserts that she did not realize she had failed to include a "statement of accuracy" in the campaign flyer until she received a copy of the complaint filed by Brown. She maintains that as soon as she learned the statement of accuracy was omitted from the campaign piece, she asked Kruesi to send a signed statement of accuracy to the office of the Commissioner of Political Practices (Commissioner).

16. Kruesi contends that MacDonald signed a statement of accuracy in her presence, and that on November 6, 2006 Kruesi emailed the statement of accuracy to the office of the Commissioner, along with a copy of the campaign flyer that is the subject of Brown's complaint.

17. The office of the Commissioner has been unable to locate a copy of the emailed statement of accuracy that Kruesi contends she sent on November 6, 2006.

18. According to records provided by MacDonald, the cost of production and distribution of the campaign flyer was $1,483.47.

STATEMENT OF FINDINGS

Alleged Violation of § 13-37-131, MCA

The complaint alleges that MacDonald's campaign flyer contains false statements or misrepresentations in violation of § 13-37-131, MCA. That statute prohibits a person from misrepresenting "a candidate's public voting record or any other matter that is relevant to the issues of the campaign *with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false*." (Emphasis added). Brown alleges that MacDonald's campaign flyer misrepresents his public voting record on HB 667.

Very recently, in the *Matter of the Complaint Against John Vincent,* Summary of Facts and Statement of Findings (July 25, 2008), this office discussed in some detail the standard of proof necessary to prove a violation of § 13-37-131, MCA.

The original source of the mental state requirement set forth in the statute is the landmark case of New York Times v. Sullivan, 376 U.S. 254 (1964). As discussed in the *Matter of the Complaint Against John Vincent* decision, courts that have applied the New York Times standard have consistently afforded a high degree of First Amendment protection to campaign statements made by candidates for public office. To establish that MacDonald violated § 13-37-131, MCA, it would be necessary to prove that she knowingly made a misrepresentation or false statement, or that she acted with "reckless disregard," which would require proof that she *subjectively* "entertained serious doubts as to the truth" of the representations about Brown that she included in the campaign flyer. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). In addition, knowledge or reckless disregard must be proven by "clear and convincing evidence," which is a higher degree of proof than substantial evidence. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). As discussed below, the facts established in this case do not support a finding that MacDonald either knowingly made misrepresentations or that she subjectively entertained serious doubts as to the truth of the representations she made.

MacDonald maintains she was not familiar with the provisions of House Rule 40-220 when she created the campaign flyer, and that she therefore believed she was accurately representing Brown's no vote on second reading on April 18, 2005. See Fact 14. MacDonald also presented documentation in support of her explanation as to why she subjectively believed that Brown was opposed to the concepts embodied in HB 667, as she represented in the campaign flyer. See Facts 8, 9, and 13.

The critical issue here is not whether Brown in fact supported or opposed HB 667, or whether the statements in MacDonald's campaign flyer are accurate or inaccurate. The issue is whether there is sufficient evidence to establish with clear and convincing proof that MacDonald either knowingly made a misrepresentation regarding these questions, or subjectively entertained serious doubts regarding the representations that she made. I find there is insufficient evidence to prove either proposition, and consequently there is insufficient evidence that MacDonald violated § 13-37-131, MCA.

Alleged Violation of Code of Fair Campaign Practices

The complaint alleges that the campaign flyer created by MacDonald "is contrary to" Montana's Code of Fair Campaign Practices. The Code of Fair Campaign Practices (the Code) is codified in §§ 13-35-301 and 13-35-302, MCA. A candidate may voluntarily subscribe to the Code. The Commissioner's office has the responsibility to prepare a form that sets forth the Code and send a copy of the form to each candidate required to file reports and other information with the Commissioner's office. A candidate's failure or refusal to sign the form is not a violation of the election laws. § 13-35-302, MCA. Moreover, the Commissioner has no authority to take any action if a candidate is alleged to have violated the Code. *Matter of the Complaint Against John Vincent*, Summary of Facts and Statement of Findings (July 25, 2008); Matter *of Complaint Against Brian Close, et al.*, Summary of Facts and Statement of Findings (March 25, 2005).

Alleged Violations of § 13-35-225, MCA

The complaint alleges that MacDonald's campaign flyer did not include a statement of accuracy, as required by § 13-35-225(3), MCA. The statute provides, in relevant part, as follows:

> **Election materials not to be anonymous -- statement of accuracy.** (1) All communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising must clearly and conspicuously include the attribution "paid for by" followed by the name and address of the person who made or financed the expenditure for the communication. When a candidate or a candidate's campaign finances the expenditure, the attribution must be the name and the address of the candidate or the candidate's campaign. In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer.
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> . . .
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> (3) (a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include:
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> . . .
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> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.
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> (b) The statement required under subsection (3)(a) must be signed:
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> (i) by the candidate if the election material was prepared for the candidate or the candidate's political committee and includes information about another candidate's voting record; or
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> (ii) by the person financing the communication or the person's legal agent if the election material was not prepared for a candidate or a candidate's political committee.
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> (4) If a document or other article of advertising is too small for the requirements of subsections (1) through (3) to be conveniently included, the candidate responsible for the material or the person financing the communication shall file a copy of the article with the commissioner of political practices, together with the required information or statement, at the time of its public distribution.
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> (5) If information required in subsections (1) through (3) is omitted or not printed, upon discovery of or notification about the omission, the candidate responsible for the material or the person financing the communication shall:
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> (a) file notification of the omission with the commissioner of political practices within 5 days of the discovery or notification;
> (b) bring the material into compliance with subsections (1) through (3); and
> (c) withdraw any noncompliant communication from circulation as soon as reasonably possible.

The campaign flyer created and distributed by MacDonald did not include the statement of accuracy required by the statute. As noted in Facts 15-17, MacDonald maintains that as soon as she became aware that the flyer did not include the required statement, she asked Gretchen Kruesi to send a statement to the office of the Commissioner. While the office has not been able to locate the statement in its records, the Commissioner does not question that MacDonald made a good faith effort to comply with subsection (5) of the statute. Nevertheless, compliance with that subsection does not cure a violation of the statute, nor does it prohibit an action seeking a civil penalty if appropriate. See *Matter of the Complaint Against Excellence in Voting*, Summary of Facts and Statement of Findings (November 1, 2006), at 8.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that Margie MacDonald violated § 13-37-131, MCA. The Commissioner has no enforcement authority for alleged violations of the Code of Fair Campaign Practices, §§ 13-35-301 and 13-35-302, MCA. There is sufficient evidence to conclude that the campaign flyer created and distributed by Margie MacDonald violated a provision of § 13-35-225, MCA. The flyer contained information regarding Roy Brown's voting record and did not include a signed statement of accuracy, in violation of §§ 13-35-225(3)(a)(iii) and 13-35-225(3)(b), MCA.

Dated this 25th day of July, 2008.

Dennis Unsworth
Commissioner